(15)

CASE 04-967

In The Supreme Court Of The United States

NORMA McCORVEY,
FORMERLY KNOWN AS JANE ROE,

Petitioner

Vs.

BILL HILL, Dallas County District Attorney,

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Brief of American Life League and Yvonne Moore, M.D. AMICI CURIÆ FOR PETITIONER

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RESPONDENT

THE QUESTION PRESENTED FOR REVIEW

Whether the Court should hear the petition for writ of certiorari by Norma McCorvey, the Jane Roe of the *Roe v. Wade* case 410 U.S. 113 (1973)?

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MISCELLANEOUS

A WOMAN'S RIGHT TO KNOW © 2003, Texas Department of Health, http://www.dshs.state.tx.us/wrtk/pdf/booklet.pdf 7, 9

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BRIEF OF *AMICII CURIAE*

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amicii have a substantial interest in the disposition of this case. Amicus American Life League is an educational organization dedicated to raising public awareness re the facts about abortion. All other Amicii are physicians who formerly performed abortions or formerly talked to women and then referred them for abortions or both. In 1973 and for a time afterwards, they supported the *Roe v. Wade* 410 U.S. 113 (1973) decision and were abortion providers. As conditions and relevant facts changed over time, however, they realized that the factual basis for *Roe v. Wade* either was originally flawed or had become flawed by changes which took place after 1973. If the Court accepts the present petition, they will present to the Court certain changes relevant to abortion providers which changes have destroyed the factual foundation as perceived in 1973 for the original *Roe v Wade* decision 410 U.S. 113 (1973).

Pursuant to Supreme Court Rule 37.6 Amici state that the brief was prepared in its entirety by Amici curiae and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amicii curiae*, their members, and their counsel.

SUMMARY OF REASONS FOR GRANTING CERTIORARI

1 In the original *Roe v. Wade* 410 US 113 (1973), hereafter referred to as Roe v Wade, an underlying, implied, unstated reason for waiving mootness and considering the case not moot even though the pregnancy had terminated before the case was argued

or decided, was that the questions presented were of great public importance, especially to pregnant women. Abortion is still a matter of great enough public importance, especially to pregnant women who may be injured if they abort, to overcome allegations of mootness relied on by the lower court.

2 In early 1967, abortion was illegal at all times of pregnancy in every US jurisdiction in nearly every possible situation and in nearly every country. Accordingly, because of the short time between legalization and the filing of the original *Roe v. Wade* case, there had been no opportunity before *Roe v. Wade* was decided to adequately study the consequences of legal abortion. Even if there had been sufficient time, the procedure used to decide the facts did not permit cross examination or other development of facts in the lower court which would have given this Court a better factual foundation.

3 An unending avalanche of scientific progress and new knowledge not considered by the *Roe v. Wade* decision illustrates that abortion causes so many problems that physicians increasingly abandon or refuse to take up the practice of abortion. The same reasons indicate that *Roe v. Wade* 410 U.S. 113 (1973) should be reconsidered. Performing abortions was and is lucrative. Thousands of physicians flocked to this lucrative new medical practice. However, to their surprise, most of these physicians learned that abortion was far from the idyllic procedure suggested by proponents to this and other courts. Facts not considered by this Court in the *Roe v. Wade* decision illustrate reasons why the present petition should be granted, why providing abortion is being abandoned by large numbers who have provided abortion, and why providing abortions has been shunned by nearly all new physicians

4 In 1973, this Court stated that early abortion was safer than continuation of the pregnancy to childbirth.

Safer, as used by the Court, meant based on selected limited data then available, abortion was less likely than pregnancy to immediately kill the woman. Experience since 1973 indicates that considering longer periods after the procedures reverses the conclusion of the Court in *Roe v. Wade* 410 U.S. 113 .

5 When the *Roe v. Wade* opinion was announced, pro-choice women rejoiced, while pro-life women asked: "Has killing lost its horror?" Subsequently, the pro-choice women had more than a million annual abortions comprising about half their pregnancies, while the pro-life women usually cherished their pregnancies, whether wanted or not, and gave birth about twice as frequently as the pro-choice women. Abortion causes demographic changes which lower fertility sufficiently to diminish and partially destroy populations which advocate abortion. As the abortion advocating population relatively diminishes, relative opposition to abortion increases so that legal abortion contains the seeds of its own political demise. These demographic changes are causing abortion to become less popular in the US so that the *Roe v. Wade* decision will be overruled, either by this court or relatively soon by Amendment or legislation.

6 *Roe v. Wade* contributes to the defeat of many pro-choice politicians. Part of the reason why pro-choice politicians are finding it increasingly difficult to get elected is that ubstantial numbers of people believe that the *Roe v. Wade* decision was unjust and not sufficiently supported by foundational facts or law. These same public perceptions are so widely believed that they are distorting US politics. Accordingly, they are a strong reason for this Court to reconsider *Roe v Wade.*

REASONS FOR GRANTING CERITORARI

I.

PUBLIC IMPORTANCE IS AN IMPORTANT REASON FOR WAIVING MOOTNESS

In the *Roe v. Wade*, 410 U.S. 113 (1973) decision this Court held that mootness should not apply because the present petitioner, then aka Jane Roe, had standing to undertake the *Roe v. Wade* litigation, that she presented a justiciable controversy, and that the termination of her 1970 pregnancy had not rendered her case moot. The *Roe v. Wade* decision prevented the enforcement of the pre-existing abortion laws of all fifty states.

Some states have since passed legislation which was limited to what they felt could pass Constitutional muster in view of *Roe v. Wade*, 410 U.S. 113 (1973) and its progeny. Under these circumstances, and because of the importance of the *Roe v. Wade* decision, this Court should permit the present petition to be heard because the technical arguments to reject the present petition are not substantially stronger than the arguments for mootness that were rejected in 1973, and the public importance of the abortion issue, particularly to pregnant women who may be injured if they abort, has not diminished since 1973.

It cannot be shown that amendments since 1973 to the prior Texas law resulted from a desire to repeal the law and make abortion on demand legal. It is reasonable to assume the purpose of the amendments was not to repeal the abortion law found unconstitutional by *Roe v Wade*, but rather from a desire to come to terms with what would be permitted by this Court in view of its *Roe v. Wade* decision. Rejecting this petition because of a technicality of mootness that was waived in order to hear the original *Roe v. Wade* petition would also increase the disdain

with which many millions of Americans view this Court because of the *Roe v. Wade* decision.

II.

THERE WAS NOT ENOUGH TIME BEFORE 1973 TO DETERMINE RELEVANT ABORTION RELATED FACTS FOUNDATIONAL TO THE *ROE V. WADE* DECISION

In early 1967, abortion was illegal at all times of pregnancy in every US jurisdiction in nearly every possible situation as well as in nearly every other country. In 1967, legislation passed making abortion legal for limited circumstances for limited times in the United Kingdom and in two states making abortion legal in those states at the beginning of 1968. Initially in 1968, there could be no record on which to judge the effect of legal abortion because abortion had been illegal.

Because abortion was illegal until 1968, the lower courts and this Court in making the *Roe v. Wade* decision lacked sufficient facts relating to the effect of legal abortion on which to base their opinions. The foundational factual basis largely comprised partisan opinions enshrined into arguments.

This Court, in the *Roe v. Wade* decision, compared the safety and danger of abortion to childbirth by comparing the death rates from abortion immediately after the abortion to the much longer period related to pregnancy. The *Roe v. Wade* opinion suggests that this Court did not know when *Roe v. Wade* was decided that the danger from abortion continues beyond the time the Court stopped considering abortion caused deaths and comparing the chance of such deaths to the chance of deaths related to pregnancy.

When *Roe v. Wade* was argued there was insufficient background re legal abortion permitting study of problems relating to women who had had

abortions because insufficient time had elapsed for problems to arise and be studied. For example, emotional trauma can follow abortion, but the woman's initial response is frequently relief that the problem pregnancy is gone. The trauma frequently arises later, and some times causes suicide. Physical problems also are likely to arise later, rather than immediately.

III.

SCIENTIFIC PROGRESS AND NEW KNOWLEDGE NOT CONSIDERED BY THE *ROE V. WADE* DECISION ILLUSTRATE NEW FACTS AND PROBLEMS THAT SUGGEST RECONSIDERATION

Performing abortions was and is lucrative, permitting physicians to earn more than $1,000.00 per hour. In addition to being lucrative, performing early abortions is relatively simple compared to many other types of medical practice. In 1973, the down side to performing abortions was not yet known. Accordingly, thousands of physicians flocked to this lucrative new medical practice. In physicians' offices for 6-week abortions, the least expensive type of abortion, the mean charge has been about $600.00 and the median charge has been about $500.00.[1]

Most of the physicians who began performing abortions after legalization learned that abortion was far from the idyllic procedure suggested by proponents in arguments to this and other courts. As time went on, new research led to new knowledge about pre-born babies and the effect of abortion on women and on society. This new knowledge has caused every excuse for legalized abortion on demand to attenuate or dissipate. It has caused former providers to abandon abortion practice and nearly all new physicians to avoid abortion.

The number of physicians' offices, clinics and hospitals where abortions are performed in the United States has been declining since 1982. The number of abortion providers has recently continually declined so that 87% of US counties have no abortion provider.[1]

Respondent's State of Texas Government summarizes some of this new knowledge and a few of these problems in the booklet "A woman's right to know"[2]

Texas' booklet states in part:

> "Introduction
>
> "You are reading this booklet, 'A Woman's Right to Know' because you are thinking about having an abortion.
>
> "Texas law says your doctor must talk to you about certain things before you can have an abortion.
>
> "Some of the things your doctor must talk to you about include...Characteristics of the unborn child...The medical risk of having an abortion..."

The booklet first describes with photos the pre-born embryo and fetus. It then describes the most important types of abortions and lists for each type of abortion "Possible side effects and risks". More than 90% of the side effects and risks for each type of abortion are not considered in Roe v Wade.

The booklet then lists six reasons why the woman should go to the emergency room. None of these reasons are considered in the *Roe v. Wade* decision.

The booklet then considers "Emotional side of an abortion" as follows:

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[1] THE ACCESSIBILITY OF ABORTION SERVICES IN THE UNITED STATES, 2001, Henshaw and. Finer (Alan Guttmacher Institute) http://www.agi-usa.org/pubs/fb_induced_abortion.html page 18

[2] A WOMAN'S RIGHT TO KNOW © 2003, Texas Department of Health, http://www.dshs.state.tx.us/wrtk/pdf/booklet.pdf)

"Some women may feel guilty, sad, or empty, while others may feel relief that the procedure is over. Some women have reported serious psychological effects after their abortion, including depression, grief, anxiety, lowered self-esteem, regret, suicidal thoughts and behavior, sexual dysfunction, avoidance of emotional attachments, flashbacks, and substance abuse. These emotions may appear immediately after an abortion or gradually over a longer period of time. These feelings may recur or be felt stronger at the time of another abortion, or a normal birth, or on the anniversary of the abortion...."

None of the possible adverse emotional effects of abortion were considered by the *Roe v. Wade* decision.

The booklet then considers "Future childbearing and infertility". The booklet states in part:

"The risks are fewer when the abortion is done in the early weeks of pregnancy. The further you are along in your pregnancy, the greater the chance of serious complications and the greater the chance of dying from the abortion procedure. Some complications associated with an abortion such as infection or a cut or torn cervix, may make it difficult or impossible to become pregnant in the future or to carry a pregnancy to term.

"Some large studies have reported a doubling of the risk of premature birth in later pregnancy if a woman has had two induced abortions. The same studies report an 800% increase in the risk of extremely early premature births (less than 28 weeks) for a woman who has experienced four or more induced abortions. Very premature babies, who have the highest risk of death, also have the highest risk for lasting disabilities such as mental retardation, cerebral palsy, lung and

gastrointestinal problems and vision and hearing loss."

Abortion may increase risk of breast cancer. The development of a baby in a woman's body is a complex, subtle procedure. The baby and the pregnant woman produce many hormones which help to control the pregnancy and to finally terminate the pregnancy in birth. The time ratio in hormone change between a normal pregnancy and an abortion is analogous to the difference in time ratio between a normal airplane landing and a crash.

In a normal pregnancy, all the signals are followed by the expected events. Hormone levels increase to help cause the expected events. The happening of expected events is detected. Feedback reduces hormone levels to the desired levels at desired rates.

In contrast to a normal pregnancy, while the woman's and baby's bodies are interacting via the typical actions and signals, abortion immediately terminates the pregnancy without the normal steps and changes in the hormonal interrelationships.

To illustrate, during the pregnancy, the breasts prepare to nurse the expected to be born baby. During certain stages of the pregnancy and their preparation for a live birth, the woman's breasts are more susceptible to the development of a pre-cancerous condition that makes the woman more susceptible to later breast cancer.

The Texas State Government pamphlet "A woman's right to know"[3] considers breast cancer risk possible as follows:

> "Your chances of getting breast cancer are affected by your pregnancy history. If you have carried a pregnancy to term as a young woman, you may be less likely to get breast cancer in the

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[3] "A woman's right to Know", supra, fn. 2.

future. However you do not get the same protective effect if your pregnancy is ended by an abortion. The risk may be higher if your first pregnancy is aborted.

"While there are studies that have found an increased risk of developing breast cancer after an induced abortion, some studies have found no overall risk...."

Additional new knowledge which should cause this Court to revisit *Roe v. Wade* comprises in part: (1) visual color still photos and motion pictures taken primarily by ultrasound, (2) bad physical and emotional after effects caused by abortion and described by the Texas State booklet previously, that suggest that for many, perhaps most women, abortion is more dangerous than continuation of a temporarily unwanted pregnancy, (3) evidence that a pregnancy that is not wanted at the time most women decide to abort, frequently, perhaps usually, becomes very wanted at some later time causing the mothers to be relieved that they did not abort, (4) improvement in care of the tiniest humans so that ever younger babies can survive, many without relevant damage.

Abortion is attempting to solve one or more problems by terminating the pregnancy by killing and removing the body. If they are going to go through with the abortion, it is necessary for many women to avoid thinking about what an abortion is. Instead they focus on solving their problems and their hope that the abortion will help them solve their problems. Without this avoidance, it is difficult to perform abortions, assist in the performance of abortions, refer for abortions, have abortions, or favor the legality of abortion. Unfortunately for women who abort, the problems frequently continue or the avoidance may later become impossible causing them to be faced with haunting memories of what they did.

Today's technology goes far beyond that available in 1972, and makes it virtually impossible to hide the facts necessary to be hidden in order for a normal person to be pro-choice. Today anyone can find ultrasound images on the internet and see amazingly clear color motion picture images of not yet born humans doing many of the things that make infants seem so cute, and looking so much like a newborn as to lead to the conclusion that aborting them is not much different than killing a newborn.

Technology is trending toward enabling the survival of ever smaller human babies. Recently there was an article about a young woman who weighed less than 10 ounces at birth and grew up to become an honor student who plays the violin.[4]

Other articles recently described a baby of slightly over 8 ounces at birth who survived and was projected to go home within days. These advances make obsolete the premise of *Roe v. Wade* that babies born at less than six months have an insignificant chance to survive.

IV.

MODERN DATA INDICATES THAT ABORTION IS NOT SAFER THAN CHILDBIRTH

In 1973 in *Roe v Wade*, this Court held that early abortion was safer than continuation of the pregnancy to childbirth. Safer, as used by the Court, meant that aborting was less likely to immediately kill the woman compared to the risk of dying during or immediately after a pregnancy during the nine months before birth and the immediate post birth period.

Post-1973 data disagrees and shows that danger from abortion extends for many years after the abortion is apparently successfully performed without incident.

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[4] AP article, OC Register 8/19/2004, page News 9

Extending the time during which the danger of pregnancy and abortion are considered or comparing death rates after abortion and after child birth contradict the conclusion of the Court in *Roe v. Wade* because so much of the potential damage caused by abortion is not immediate.

The relative safety of abortion and child birth are questions that can be answered accurately by good science. This Court should rely on science, not opinion, the prior biases of justices, briefs which are by their very nature limited, argument to answer relevant scientific questions, or the other typical data input mechanisms used by appellate courts. Science is not theory. Science is theory as amended whenever new relevant facts are discovered. The nature of science usually prevents the answer of controversial complicated questions in a short time. The most effective way for this Court to compare death rates of abortion and childbirth, or to answer any other scientific questions of interest is to send this case back to the trial court with appropriate instructions.

The difference in suicide rates alone indicates that abortion is more dangerous than childbirth. According to a study by the Finnish Government,[5] women who have had an abortion have an increased risk of suicide. Information from death certificates of women aged 15-49 years was linked with national health records to find the recent reproductive history of the women who committed suicide. While the general rate of suicide for women of childbearing years was 11.3 per 100,000, among women who had an abortion the suicide rate was 34.7 per 100,000. Women in that age

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[5] Gissler, et al., SUICIDES AFTER PREGNANCY IN FINLAND, 1987-94:REGISTER LINKAGE STUDY, British Medical Journal, 313:3-12 1996). The Authors are members of the Unit of Statistics, Registers and Information Systems, National Research and Development Centre for Welfare and Health Institute of the Finnish Government Department of Mental Health.

group who had given birth had a suicide rate of 5.9 per 100,000.

The following analysis of California Government records agrees with the Finnish study that abortion is far more dangerous than childbirth.[6]

> "Abstract
>
> "Methods. California Medicaid records for 173, 279 women who had an induced abortion or a delivery in 1989 were linked to death certificates for 1989 to 1997.
>
> "Results. Compared with women who delivered, those who aborted had a significantly higher age-adjusted risk of death from all causes (1.62), from suicide (2.54), and from accidents (1.82), as well as a higher relative risk of death from natural causes (1.44)..."

If one compares similar countries that differ in re legality of abortion, abortion is associated with increased maternal mortality rate. For example,

Ireland, which had not legalized abortion, since 1980, has consistently had a lower maternal mortality rate than the United Kingdom, which is similar other than for legal abortion.[7] Amici suggest that the reasons may comprise residual physical and/or psychological damage caused by abortion.

V.

DEMOGRAPHIC CHANGES SUGGEST THAT ABORTION WILL SOON BE ILLEGAL REGARDLESS OF WHAT THIS COURT DOES

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[6] David C. Reardon, et al., "*Deaths Associated with Pregnancy Outcome*", quoted and cited in Thomas W. Strahan, "*DETRIMENTAL AFFECTS OF ABORTION: AN ANNOTATED BIBLIOGRAPHY WITH COMMENTARY*" (Springfield, IL: Acorn Books, 2000)

[7] UNICEF, The State of the World's Children, 1999, Table 7

European trends illustrate why and how demographic trends are changing the US abortion issue. This year Europe will have more deaths than births, a fertility rate below 1.4, less than 2/3 that necessary to maintain population, and a declining population. Polling data indirectly indicates and focus group interviews directly indicate that that portion of the US that supports legal abortion and the *Roe v. Wade* decision has demographic data similar to Europe and, perhaps because of abortion, is not reproducing itself.

In contrast, that part of the US which opposes legal abortion and opposes the *Roe v. Wade* decision is believed to have a fertility rate above replacement level, perhaps twice the fertility rate of the pro-legal-abortion population.

The US total fertility rate has declined by about one child per family to below replacement level since 1965, immediately before abortion became widespread. This fertility decline was followed a generation later by a shortage of young workers which has been one cause of massive immigration, so that the national origin of US population has changed and continues to change substantially as immigrants take the place of children not born to those who favor legal abortion.

VI.

THE *ROE V. WADE* DECISION PAVES THE WAY FOR ITS CHANGE BY MASSIVELY AFFECTING POLITICS

The *Roe v. Wade* decision affects most of the more important US elections. On average, there is a substantial benefit to candidates who oppose Roe v Wade, because for those who favor legal abortion, it is only one important issue. To the contrary, for most of those who favor the right to life, it is the most important issue, often more important than all other issues combined.

Part of the reason why it is so easy to use the *Roe v. Wade* decision to defeat so many Democratic and pro-choice candidates is that so many people believe that the *Roe v. Wade* decision is unjust and not based on a sufficient factual foundation, and that the 1973 Court unfairly legislated.

Accordingly, *Roe v. Wade* is perhaps the second most extreme case ever (after Dred Scott) of what goes wrong when the US Supreme Court is believed to act unfairly and unjustly. It is not only important that US Supreme Court procedures be fair and just, it is also important that US Supreme Court procedures and results seem to the public to be fair and just, if the decisions are to stand. As long as relief such as that sought by petitioner McCorvey is not granted, it will reduce the chance of election of pro-choice advocates, until *Roe v. Wade* is reversed by this Court or by Amendment or legislation.

Regardless of how this Court will ultimately rule on reversing Roe v Wade, it is in the public interest and in this Court's interest to grant the present petition and to order a factual proceeding to determine if there is a factual foundation supporting Roe v Wade. If the factual situation is re-examined, *Roe v. Wade* will no longer be seen so much as a decision obviously based on mere allegations rather than facts.

CONCLUSION

For the reasons submitted above, and in the petition, certiorari should be granted.

Date: 2/2/2005

RESPECTFULLY SUBMITTED,

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